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Recommended Citation
Reply Brief, *Utah v. Ison*, No. 991030 (Utah Court of Appeals, 1999).
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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
LEW ISON,	:	Case No. 991030-CA
Defendant/Appellant,	:	

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for two counts of communication fraud, a third degree felony, in violation of Utah Code Annotated section 76-10-1801 (1999) in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable L. A. Dever, presiding. Mr. Ison is not presently incarcerated.

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FILED
Utah Court of Appeals
JAN 16 2004
Paulette Stagg
Clerk of the Court

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INTRODUCTION

In its brief, the State misstates the issues presented on appeal and misapplies the law. Under modern rules of evidence, the administrative law judge's decision ("ALJ") was admissible as evidence supporting Mr. Ison's innocence. Further, the prosecutor's comments on Mr. Ison's failure to call a pivotal witness without obtaining a required advance ruling misled the jury and communicated that Mr. Ison could not support his defense. The trial judge then misinformed the jury on the law on Mr. Ison's contractual obligations and failed to give Mr. Ison an opportunity to object to this instruction as required under state constitutional and case law. Moreover, because Mr. Ison claims his defense counsel was ineffective, he properly challenges for the first time on appeal the procedures relating to the erroneous instruction and his right to presence. Defense counsel's failure to object to these errors altered the jury's verdict because each of them directly addressed Mr. Ison's innocence. The trial transcript further supports that, in any

event, Mr. Ison acted in good faith and without any criminal intent. Finally, defense counsel harmed Mr. Ison by not objecting to an unlawful restitution award that resulted in Mr. Ison paying almost $1,300 in restitution.

I. DEFENSE COUNSEL'S FAILURE TO ADMIT EVIDENCE THAT EXONERATED MR. ISON, OBJECT TO INADMISSIBLE EVIDENCE THAT COMMUNICATED MR. ISON'S GUILT, AND ALERT THE TRIAL JUDGE THAT HE HAD MISINFORMED THE JURY ON THE LAW, RESULTED IN THE JURY'S GUILTY VERDICTS

Defense counsel's numerous missteps directly led to Mr. Ison's convictions. Defense counsel failed to present admissible evidence that supported Mr. Ison's innocence. Counsel also failed to object to the prosecutor's improper comments on Mr. Ison's failure to present evidence. The record further establishes that defense counsel consented to the trial judge misinforming the jury about Mr. Ison's contractual duties which formed the basis for the charges. Moreover, the Utah Constitution and established law required the trial judge to discuss the jury's question about the purchase agreement in Mr. Ison's presence. Because each of these deficiencies directly addressed Mr. Ison's guilt or innocence, defense counsel's failings resulted in the jury's guilty verdicts. At the very least, the cumulative effect of these errors deprived Mr. Ison of a fair trial.

A. Defense Counsel Failed to Present Admissible Evidence that Established Mr. Ison's Innocence

Well-established law conclusively shows that under modern rules of evidence the ALJ's decision was admissible to support Mr. Ison's innocence. The State, instead, applies an anachronistic approach to evidentiary questions. In fact, the ALJ's decision was presumptively admissible and the State presents no reasons to rebut that presumption. The State's reliance on collateral estoppel is irrelevant to this appeal and simply diverts this Court's attention from defense counsel's failure to present admissible evidence that establishes Mr. Ison's innocence.

ALJ decisions are admissible under Utah Rule of Evidence 803(8)(C). Because the framers of the Utah Rules of Evidence sought uniformity with the federal rules, this Court applies the federal courts' construction of the rules of evidence. State v. Webster, 2001 UT App 238, ¶22 & n.1, 32 P.3d 976. Several federal courts of appeals have upheld the "admissibility of findings of officials and agencies within the executive branch" under rule 803(8)(C). Zeus Enterprises v. Alphin Aircraft, Inc., 190 F.3d 238, 242 (4th Cir. 1998). Agency officials' reports are admissible because public officials presumably perform their duties reliably, it is wasteful to bring public officials to court, and reports are more reliable than public officials' often faulty memories:

> [Rule 803(8)(C)] is based upon the assumption that public officers will perform their duties, that they lack motive to falsify, and that public inspection to which many such records are subject will disclose inaccuracies. In addition the

> disruptive effect of bringing public officials into court to testify about matters that have generally been accurately reported and recorded is avoided. Use of the record also serves the public convenience by saving time and the expenditure of public money. Moreover, the record is likely to be much more reliable than the official's often hazy recollection.

Michael R. Graham, Handbook of Federal Evidence §803.8 at 398 (5 th Ed. 2001) (citing Advisory Committee to Federal Rules and numerous other scholars) (footnotes omitted).

Based on this reasoning, several federal courts have specifically ruled that an ALJ's decision following an investigative hearing is an admissible public record. Zeus , 190 F.3d at 242; Henry v. Daytop Village, Inc., 42 F.3d 89, 96 (2nd Cir. 1994); In re Paducah Towing Co., 692 F.2d 412, 421 (6th Cir. 1982); Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1182-83 (3rd Cir. 1978). State courts have agreed that ALJ decisions are admissible. Larsen v. Decker, 995 P.2d 281, 283-85 (Ariz. Ct. App. 2000); Leiting v. Mutha, 58 P.3d 1049, 1052-53 (Colo. Ct. App. 2002). The United States Supreme Court has similarly ruled that conclusions "based on a factual investigation" following an administrative hearing are admissible under Rule 803(8)(C). Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988) (admitting a judge advocate general's report of an airplane accident, including its conclusions). In fact, in enacting Rule 803(8), the Advisory Committee noted that agency decisions following an investigative hearing such as the one that occurred in this case enhance the reliability of the agency's findings. Graham, Handbook of Federal Evidence § 803.8, at 390. In any event, the ALJ's decision here certainly fits this Court's assessment of Rule 803(8)(C) that a public

report is admissible when "a public official [] made the report within the scope of his or her duty." State ex rel. W.S., 939 P.2d 196, 200 (Utah Ct. App. 1997).

Contrary to the State's characterizations, public records are presumptively admissible under Rule 803(8)(C). "The admissibility of a public record specified in the rule is assumed as a matter of course unless there are sufficient negative factors to indicate a lack of trustworthiness. . . ." Zeus, 190 F.3d at 241 (discussing Advisory Committee notes). "Rule 803(8)[(C)] 'is not a rule of exclusion, but rather is a rule of admissibility' as long as the public record meets the requirements of the rule." Id. (quoting Fred Warren Bennett, Federal Rule of Evidence 803(8): The Use of Public Records in Civil and Criminal Cases, 21 Am. J. Trial Advoc. 229, 232 (1997)). Thus, "[t]he party opposing admission has the burden to establish unreliability." Id. Here, the State makes no attempt to argue that the ALJ's decision was not trustworthy.

Instead, the State argues that the ALJ's decision is not admissible under the collateral estoppel doctrine. State's Brief at 11-12. Under that doctrine, parties need not "relitigate issues that have been resolved in their favor" in a prior proceeding. State v. Byrns, 911 P.2d 981, 984 (Utah Ct. App. 1995). Mr. Ison has never argued for collateral estoppel barring re-litigating the facts of his case. Rather, he cites well-established law to support his claim that the ALJ's decision was admissible evidence in support of his defense theory. The State's analysis of collateral estoppel is inapposite to this claim.

The State's remaining objections to admitting the ALJ's decision are antiquated

and have been repudiated. The federal cases the State cites interpreted the former rules of evidence long before the modern version of the federal rules were adopted in 1975. State's Brief at 12-14; Utah Rules of Evidence at 642 (Preliminary Note) (2003). Under contemporary rules of evidence, "Rule 803(8)[(C)] 'is not a rule of exclusion, but rather is a rule of admissibility' as long as the public record meets the requirements of the rule." Zeus, 190 F.3d at 241 (quoting Bennett, 21 Am. J. Trial Advoc. at 232).

Moreover, Rule 803(8)(C) draws a distinction between judicial branch and agency findings. Id. at 242. In particular, the concern for jurors giving undue weight to a judge's findings are less pronounced when dealing with ALJ findings as opposed to judicial branch judges. Id. Further, the advantages of public officials presumably fulfilling their duties reliably and without bias plus the convenience and efficiency of admitting public reports provide strong policy support for admission under Rule 803(8)(C). Graham, Handbook of Federal Evidence §803.8, at 398. Modern Rule of Evidence 803(8)(C), thus, actually assists jurors rather than interfering with their fact-finding role.

Given the admissibility of the ALJ's report, defense counsel unreasonably failed to offer this exculpatory evidence in support of the defense. State v. Labrum , 925 P.2d 937, 941 (Utah 1996). Likewise, because this report specifically addressed Mr. Ison's conduct and completely exonerated him, defense counsel's conduct undermines the jury's verdicts. State v. Templin, 805 P.2d 182, 187 (Utah 1990). The State concedes

the decisive nature of the ALJ's decision when it argues that the decision would unduly influence the jury's deliberations. State's Brief at 13-14. Although the State overvalues the effect an ALJ's decision has on jurors, its concerns about the impact this evidence will have in this case implicitly acknowledges its probative value. Indeed, because the ALJ's decision affirmed Mr. Ison's innocence, defense counsel was ineffective for failing to present it. Templin, 805 P.2d at 187.

B. Defense Counsel Further Prejudiced the Jury By Failing to Object to the Prosecutor's Comments on Mr. Ison's Failure to Call a Pivotal But Unavailable Witness

The prosecutor's comments on the failure to call Allison Perez to testify violated the missing witness rule because those comments went well beyond Mr. Ison's credibility. Rather, those comments implied that Ms. Perez could not support Mr. Ison's claims that NCL threatened to cancel the entire group booking. Because the prosecutor's comments addressed improper matters and the prosecutor failed to obtain an advance ruling, defense counsel's failure to object was deficient. Further, defense counsel's failure to object also prejudiced the jury because, as the advance ruling requirement suggests, comments on the failure to call witnesses may irreparably prejudice jurors.

The State mistakenly argues that the prosecutor's comments "merely suggested that defendant's credibility was suspect given that his statements were contradicted by two witnesses from NCL. . . ." State's Brief at 15. The prosecutor informed the jury,

"you've got the statement of Mr. Ison that somebody who didn't come and testify today said, oh yeah we're going to cancel the entire group." R. 392: 621. Although the prosecutor discussed Mr. Ison's "credibility," her comments implied that Mr. Ison did not call Ms. Perez to testify because she would have denied threatening to cancel the cruise. These comments were offered after the prosecutor twice instructed Mr. Ison during trial not to mention Ms. Perez because "she was not here to testify." R. 392: 546, 580-81.

The prosecutor's comments further implied that Mr. Ison was lying because he failed to present Ms. Perez to support his claims. Id. Prosecutors may not raise "matters the jury would not be justified in considering", including arguments that imply that a criminal defendant must present evidence or call witnesses to prove the defense theory. State v. Hopkins, 782 P.2d 475, 478 (Utah 1989); State v. Thompson, 776 P.2d 48, 50 (Utah 1989). Here, the prosecutor unmistakably argued that had Mr. Ison testified truthfully, he would have presented Ms. Perez's testimony in support of him.

These comments exceeded the scope of proper closing arguments. Prosecutors have latitude to "fully recount the evidence adduced and the reasonable inferences to be drawn therefrom." Hopkins, 782 P.2d at 478 (emphasis added). But, rather than "fully" addressing the evidence and drawing inferences, the prosecutor below focused on Mr. Ison's failure to call Ms. Perez. Had the prosecutor truly limited her comments to Mr. Ison's credibility she would have also explained that Ms. Perez was unavailable. Instead, she faulted Mr. Ison for not presenting Ms. Perez as a witness and implied Ms. Perez

would not have supported Mr. Ison's defense.

The State erroneously argues that even if the prosecutor commented on Mr. Ison's failure to call Ms. Perez, an objection would have simply resulted in a curative instruction that would have remedied any resulting prejudice. State's Brief at 16. The requirement to obtain an advance ruling on the failure to call a witness indicates that a curative instruction is not adequate. Advance rulings are necessary to prevent the admission of reversible error caused by comments on the failure to call witnesses:

> "To avoid injecting prejudicial error into the trial," advance permission from the trial court is needed even before counsel makes an incomplete missing witness argument. Arnold [v. United States, 511 A.2d 399, 416 (D.C. 1986)]. By so doing, the trial court can "ensure that the foundational issues are addressed before possibly improper inferences are suggested to the jury." Id. (emphasis in original) (quoting Thomas [v. United States, 447 A.2d 52, 58 (D.C. 1982)].

Harris v. United States, 602 A.2d 154, 161 (D.C. 1992). "By these practices the risk of vitiating the entire trial by improper argument as to the absence of witnesses can be obviated." United States v. Blakemore, 489 F.2d 193, 196 (6th Cir. 1973).

Requiring an advance ruling is superfluous if a curative instruction will remedy improper comments on the failure to call witnesses. Under this reasoning, Thompson 's holding on advance rulings is meaningless. To avoid such an "absurd result[]", this Court should enforce the advance ruling requirement. Thornock v. Jensen , 950 P.2d 441, 444 (Utah Ct. App. 1997).

Even if defense counsel had objected and the trial judge had admonished the jury,

a curative instruction would not have remedied the prosecutor's comments. Those comments directly undermined Mr. Ison's defense that he truthfully represented that NCL would withhold cruise documents if more funds were not forthcoming. This case essentially involved a credibility contest between Mr. Ison and Mr. Mendez. But, Mr. Mendez's testimony lacked persuasive value because he merely relied on NCL's records and had little or no personal recollection of the facts. In close cases primarily involving credibility, this Court has ruled that trial errors have a significant effect on the jury's verdict. State v. Vail, 2002 UT App 176, ¶17, 51 P.3d 1285 ; State v. Iorg, 801 P.2d 938, 942 (Utah Ct. App. 1990). Because this case turned on Mr. Ison's veracity, "'the jurors were probably influenced by the improper remarks in reaching their verdict.'" Thompson, 776 P.2d at 50 (quoting State v. Andreason, 718 P.2d 400, 402 (Utah 1986)).

C. Defense Counsel Failed to Object to the Trial Judge's Erroneous Jury Instruction that Mr. Ison Was Legally Bound to Complete the Cruise Under the Purchase Agreement

Defense counsel further provided ineffective assistance by failing to object to the trial judge's legally erroneous conclusion that Mr. Ison was bound under the purchase agreement with Mr. Fiet. Initially, the State misconstrues the law on appellants producing an adequate record. Because defense counsel failed to make a record in this case, there is no record for Mr. Ison to produce. Similarly, the State's discussion of recission and mediation is irrelevant. Because Mr. Fiet failed to satisfy a material

condition, Mr. Ison had no duty to perform under the purchase agreement. Even if Mr. Ison was bound to perform, the record undisputably establishes that Mr. Ison acted in good faith and believed that he was not bound to honor Mr. Fiet's discount pricing.

Contrary to the State's claims, Mr. Ison has produced an adequate record. State's Brief at 17-18, 20-21. "[A]ppellants have the responsibility to ensure an adequate record on appeal. . . ." State v. Wagenman, 2003 UT App 146, ¶11 n.4, 71 P.3d 184. This duty requires appellants to document support for all issues raised on appeal, including transcripts and motions. State v. Penman, 964 P.2d 1157, 1162 (Utah Ct. App. 1998).

This appeal does not involve the failure to produce an adequate appellate record. Rather, Mr. Ison claims that defense counsel was ineffective for failing to object to the erroneous jury instruction and for failing to secure Mr. Ison's right to presence. Thus, Mr. Ison's claims center on defense counsel's failure "to make an adequate record" of the trial judge's errors. State v. Baker, 963 P.2d 801, 808 (Utah Ct. App. 1998). This issue is properly raised "for the first time on appeal if . . . a claim of ineffective assistance of counsel is raised [] even though, by reason of the claimed ineffectiveness, the matter was not raised below." State v. Coonce, 2001 UT App 355, ¶7, 36 P.3d 533. Were the appellate record not adequate, Mr. Ison renews his Rule 23B motion to remand this case for a hearing to supplement the record with evidence showing that defense counsel consented to the erroneous jury instruction and failed to present Mr. Ison in court.

Because Mr. Ison has properly raised the trial judge's jury instruction on appeal,

this appeal raises whether the trial judge correctly informed the jury that the purchase agreement was binding on Mr. Ison. As a matter of black letter law, "[t]he unexcused non-occurrence of a condition . . . prevent[s] performance of the duty from becoming due." Restatement (Second) of Contracts § 225 cmt. a (1981). As this Court has ruled, the failure of a condition precedent "relieve[s] [parties] of [a] duty to perform." Grossen v. DeWitt, 1999 UT App 167, ¶12 n.5, 982 P.2d 581. Under these undisputed principles, Mr. Ison's discovery that Mr. Fiet failed to forward cruise payments relieved him of any "duty" to assume responsibility for the group booking. Id.

Because Mr. Ison had no "duty to perform", the State's discussion of recission and mediation are irrelevant to this appeal. The main questions in this case were whether Mr. Ison: (1) devised a scheme to defraud; and, (2) intentionally, knowingly, or recklessly misrepresented facts to further that scheme. Utah Code Ann. § 76-10-1801(1), (7) (1999). Mr. Fiet's failure to forward deposit money defeats both of these elements. First, because Mr. Fiet failed to satisfy a condition precedent, Mr. Ison was never legally bound to assume responsibility for the group cruise. Grossen, 1999 UT App 167, ¶12 n.5, 982 P.2d 581. Thus, Mr. Ison truthfully informed passengers that he was not contractually required to honor the arrangements with Aristocrat nor did he devise a scheme to defraud. Although recission and mediation may have been applicable in a civil suit with Mr. Fiet, they had no concern with Mr. Ison's dealings with passengers.

Second, even were Mr. Ison contractually bound to complete the group booking,

Mr. Ison's actions prove that he lacked intent to defraud. Rather, Mr. Ison had a well-founded honest belief that he had no legal obligation under the purchase agreement. Immediately upon discovering the missing business records and cruise payments, Mr. Ison requested Mr. Lofthouse to audit the group cruise account, contacted NCL and Mr. Fiet, demanded repayment when Mr. Fiet refused to cooperate, and sent a letter to Mr. Fiet and specifically explained that he would not assume responsibility for the cruise. Only after taking all of these steps, did Mr. Ison inform passengers that he had no contractual obligation to them and that more money was needed.

As these extensive efforts demonstrate, Mr. Ison had a good faith, honest belief that he was not contractually obligated to complete the group booking. Thus, the State mistakenly faults Mr. Ison for failing to seek mediation and recission. Mr. Ison's efforts to determine the shortages and the amount passengers had paid conclusively establish that he did not intentionally, knowingly, or recklessly request passengers for more money. A more detailed discussion of Mr. Ison's intent is included in section II below.

The absence of a scheme and Mr. Ison's good faith conduct, meant that he did not utter a fraudulent communication. Nevertheless, the trial judge's jury instruction that Mr. Ison was bound under the purchase agreement misinformed jurors that Mr. Ison had falsely represented his legal obligations and, thus, had committed fraud. For this very reason, defense counsel not only unreasonably failed to object to the instruction, but that failure directly resulted in Mr. Ison's conviction.

D. Defense Counsel's Mishandling of the Jury Instruction Deprived Mr. Ison of His State Constitutional and Legal Rights to Be Present at Trial

Not only did defense counsel fail to correct the trial judge's misunderstanding of the purchase agreement but his failure to present Mr. Ison in court violated Mr. Ison's rights to be present at all stages of his trial. The State fails in its attempts to distinguish State v. Lee, 585 P.2d 58 (Utah 1978), because that case remains sound constitutional law which this Court must follow. Moreover, the defendant's waiver in Lee has no application here because Mr. Ison claims ineffective assistance of counsel unlike the claims in that case. In any event, the trial judge violated Rule of Criminal Procedure 17(m) because he failed to provide Mr. Ison an opportunity to object in court to the erroneous instruction.

Despite the State's efforts to distinguish Lee, the State does not dispute that Lee has never been overruled. State's Brief at 22. Utah law clearly provides that "[t]he Court of Appeals simply cannot overrule the law as announced by the highest court in the state. . . ." Sentry Investigations v. Davis, 841 P.2d 732, 735 (Utah Ct. App. 1992). Because only the Utah Supreme Court can change its own precedent, this Court must follow Lee. Id.

Further, the State fails to distinguish Lee. That case specifically cites article 1, section 12 of the Utah Constitution as well as statutes and case law in holding that "constitutionally and statutorily and case-wise . . . any communication between judge and

jury should be in the presence of the accused, his counsel and the prosecutor." Lee, 585 P.2d at 58. The State's blanket statement that this holding is "dicta" ignores the plain language of that decision.

The State also fails to distinguish Lee when it notes that the defendant there affirmatively waived his right to presence by failing to object. State's Brief at 22. Here, although defense counsel failed to object, Mr. Ison argues that this failure constituted ineffective assistance. As explain in section IC above, Mr. Ison has properly challenged counsel's effectiveness for the first time in this appeal. Coonce, 2001 UT App 355, ¶7, 36 P.3d 533. Any other conclusion would deprive Mr. Ison of his right to counsel.

Lee's finding of harmlessness also has no application to this appeal because the trial judge in this case erroneously instructed the jury on the law. In Lee, the defendant showed no harm because the trial judge correctly instructed the jury. 585 P.2d at 59. In contrast, the trial judge below wrongly informed the jury that Mr. Ison was bound under the purchase agreement. Because this erroneous instruction mistakenly informed the jury that Mr. Ison fraudulently represented the facts, Mr. Ison suffered irreparable harm when defense counsel failed to secure his right to presence in court where Mr. Ison could have corrected the trial judge's error.

Even if Lee did not establish a constitutional right to be present, the trial judge failed to adhere to the procedures outlined in more recent cases. In both State v. Kozik, 688 P.2d 459, 460 (Utah 1984), and State v. Lucero, 866 P.2d 1, 2 (Utah Ct. App. 1993),

the trial judges brought the defendants into the courtroom and gave them an "opportunity" to object to the instruction. The trial judge failed to do so here. Instead, he simply entered the jury question into the record and proceeded with jury deliberations without presenting Mr. Ison in court. Thus, under either Lee, Kozik, or Lucero, the trial judge deprived Mr. Ison of an opportunity to correct the trial judge's mistake.

E. Defense Counsel's Cumulative Errors Require Reversal

Should this Court not be persuaded that the errors listed above do not by themselves require reversal, the cumulative effect of those errors denied him the right to " a fair trial." State v. Young, 853 P.2d 327, 368 (Utah 1993). Each of defense counsel's errors directly addressed Mr. Ison's guilt or innocence. In every instance, defense counsel either failed to present exculpatory evidence or allowed the jury to hear inadmissible misleading evidence of guilt. A new trial is necessary to secure Mr. Ison's due process rights.

II. THE RECORD ESTABLISHES THAT MR. ISON TRUTHFULLY REPRESENTED THE SITUATION AND HAD NO INTENT TO DEFRAUD ANYONE.

Even excusing defense counsel's ineffectiveness, Mr. Ison committed no crime because he accurately described the need for more funds to the passengers. The trial transcript shows that Mr. Ison acted without any criminal intent. Even the State concedes

that Mr. Ison presented a viable defense. State's Brief at 8. Because the evidence fails to support that Mr. Ison had any criminal intent beyond any measure of reasonable doubt, he requests this Court to reverse his convictions.

Despite the complicated nature of cruise group bookings, the record plainly shows that Mr. Ison truthfully stated that Mr. Fiet failed to "forward[]" "some of the monies" to NCL. Appellant's Brief; Addendum O. Mr. Lofthouse repeatedly testified that "we could not show that [cruise payments] went to Norwegian Cruise Line." R. 390: 211. Mr. Lofthouse clarified numerous times that cruise payments "did not make it" to NCL, Aristocrat was "shy [of] paying" all cruise payments, and that there was "no way [cruise payments] made it to NCL." R. 390: 205, 208, 210-13, 218. Indeed, even the State concedes on appeal that Mr. Fiet "fail[ed] to ensure that the deposits entrusted to him were properly transferred to NCL after [Mr. Ison] took over" Aristocrat. State's Brief at 34. Thus, this appeal raises the question of whether Mr. Ison intentionally, knowingly, or recklessly misrepresented Mr. Fiet's conduct in furtherance of a scheme to defraud. Utah Code Ann. § 76-10-1801(1), (7) (1999).

Mr. Ison accurately depicted that Mr. Fiet failed to "forward[]" cruise payments because Mr. Fiet was responsible in several ways for the missing funds. First, Maria Souza testified that during the first half of 1995 she transferred money out of the group cruise account for Mr. Fiet's "previous debts as a result of a [bounced] check and one credit card dispute" on other cruises totaling over $5,500. R. 391: 353. Ms. Souza was

forced to transfer this money for debts on other cruises because Mr. Fiet refused to pay the debts. Id. at 353, 358. Second, Ms. Souza testified further that Mr. Fiet bounced a check that he issued three days before selling Aristocrat's assets to Mr. Ison in the amount of $4,796. Id. at 352. In fact, Ms. Souza stated that at the time of the group booking Mr. Fiet had a history of presenting bad checks to NCL and was having "financial problems." Id. at 353-54. The State even stipulated at trial that Mr. Fiet failed to forward, at least, $15,290 to NCL. Id. at 418. Thus, there appears to be additional funds that Mr. Fiet failed to send to NCL. Third, Mr. Fiet could not recoup these losses because he had discounted his prices so drastically that his commissions were inadequate to cover other deficits. R. 390: 193-94.

Fourth, the record reveals that Mr. Fiet's poor business practices resulted in additional money not being sent to NCL. In June of 1995, the Airline Reporting Company ("ARC") automatically attempted to withdraw $11,000 from Mr. Fiet's bank for airline tickets that Mr. Fiet had booked. R. 391: 389-90, 419. The ARC provides a service to travel agencies who book airfare. When the ARC requested the funds that Mr. Fiet owed, Mr. Fiet's bank informed the ARC that the account had insufficient funds. Id. As a result, the ARC stopped its service with Mr. Fiet. Id. at 419. Also during this time, Mr. Fiet failed to pay insurance companies for travel insurance that passengers had purchased. Id. at 213, 218.

These facts provide conclusive evidence that Mr. Ison truthfully informed

passengers that Mr. Fiet failed to forward cruise payments to NCL. Although Mr. Ison did not spell out the source of each of the shortages detailed above, he accurately informed passengers that Mr. Fiet had not sent money to NCL with which passengers had entrusted him. Even the State concedes that Mr. Ison's defense is "plausible." State's Brief at 35. This evidence proves that Mr. Ison not only had no intent to defraud passengers, including recklessness, but that he devised no scheme to defraud anyone.

The State's arguments that Mr. Ison devised a scheme to earn higher commissions and that Mr. Fiet did not "pocket[]" passengers' payments are unsupported in light of the evidence. State's Brief at 31-34. The evidence is undisputed that Mr. Fiet did not send funds to NCL and that Mr. Ison needed thousands of dollars to pay for the missing payments. In fact, the State concedes that Mr. Ison likely lost his own money in an effort to complete the group booking. State's Brief at 9; R. 392: 502.

Moreover, it is irrelevant whether Mr. Fiet "pocketed" the passenger payments. The issue for this case was whether Mr. Ison falsely communicated Mr. Fiet's action to defraud passengers. The facts clearly show that he did not.

Likewise, the record supports Mr. Ison's claim that NCL "will not release any cruise documents to Continental Travel until all funds due [NCL] have been received by [NCL]." Appellant's Brief, Addendum O. Independent of Mr. Ison's testimony, Mr. Lofthouse confirmed that failure to make up the deficits placed the entire group in "jeopardy." R. 390: 220. According to Mr. Lofthouse's understanding, NCL "could

hold the entire cruise documents on the entire group." Id. at 203. More specifically, Mr. Lofthouse testified, consistent with Mr. Ison's representations, that Mr. Ison had to "fill up a certain [funding] level before the documents, cruise documents, [would be] released." R. 390: 221-22.

Mr. Mendez added that NCL strictly handled the group booking account. Mr. Mendez testified that NCL "[p]robably" would not have threatened to cancel the entire group because it would be bad business to do so. R. 391: 328-29. Mr. Mendez did not address, however, any threats to withhold cruise documents. In fact, he did not personally deal with Mr. Ison because he had assigned Ms. Perez to handle the account. Moreover, Mr. Mendez conceded that he had little recollection about the group booking. He did remember reading an entry in NCL's telephone logs that NCL had threatened to cancel the entire group if it did not receive payments for the total contract amount. R. 391: 328. Finally, Mr. Mendez conceded that NCL had threatened to cancel groups of cabins for failure to pay the total contract amount. Id. at 329.

These facts reasonably imply that NCL had threatened not to release cruise documents. Mr. Mendez's decision to restrict all leniency with Mr. Ison supports that NCL had threatened to withhold documents. Importantly, Mr. Mendez never addressed this key issue. Thus, it was impossible for the State to establish that Mr. Ison lied when he informed passengers that NCL would not release cruise documents without additional funds. In fact, given the clear contract provision allowing NCL to "automatically" cancel

group bookings, Mr. Ison had more than reasonable grounds to warn passengers of this possibility. He may have been derelict if he had not informed passengers of this fact since they risked not sailing at all. Mr. Ison truthfully represented the facts.

Mr. Ison further acted properly in stating that Mr. Fiet's discount prices were not "accurate" and that Arisocrat's contractual obligations were "null and void." Appellant's Brief, Addendum O. The inaccuracy correctly referred to Mr. Fiet's reduced commissions. Although this reference may have been a shorthand description, it constituted no scheme or intent to defraud. Moreover, as explained in section IC, because Mr. Fiet failed to forward deposits, Mr. Ison never legally assumed responsibility for the cruise, including any duty to honor Mr. Fiet's prices. See Grossen, 1999 UT App 167, ¶12 n.5, 982 P.2d 581. Thus, Mr. Ison properly stated that his agreement to assume responsibility for the cruise was void because of Mr. Fiet's actions. The State's reiteration of Mr. Ison's failure to seek recission through mediation is simply inapposite. State's Brief at 30-31. Mr. Ison had no intent to deceive when he described Mr. Fiet's pricing as inaccurate and the purchase agreement as null and void.

Finally, Mr. Ison did not misrepresent the facts when he asked Ms. Millyard to pay NCL an additional $1,000. NCL's accounting log affirmatively establishes that even though Mr. Fiet listed Ms. Millyard's and Ms. Field's names on the check for $1,000, NCL never credited these passengers for the payment or assigned them a cabin. Appellant's Brief, Addenda Q; K at 4; R. 391: 322, 335-36; 392: 555-56. Rather, NCL

treated the check the same as other checks and applied the sum to the group account. As confirmation of this fact, Mr. Mendez testified that the names would be "meaningless" and that NCL's accounting department would have applied the check to the group without crediting any specific passengers for the payment. R. 391: 428, 436.

When Mr. Ison contacted Ms. Millyard about the $1,000, he truthfully informed her that NCL had not credited her for the payment. Because of Mr. Fiet's shortages on this cruises as well as prior cruises, NCL took money from the group booking to pay for debts unconnected to this cruise. Thus, when NCL credited the $1,000 check to the group account and then transferred money out of the account to pay for Mr. Fiet's other debts, Mr. Ison could not determine whose money NCL had taken from the account. Further, because NCL had credited all checks to the group account and not to any specific passengers, the absence of business records left Mr. Ison in the untenable position of deciding which passengers should be credited and which should not.

When Mr. Ison asked Ms. Millyard to send NCL a credit card payment of $1,000 he truthfully stated that NCL had not credited her for the payment. Accordingly, he advised Ms. Millyard to pay by credit card so NCL would be sure to assign her a cabin. In doing so, he had no intent to defraud Ms. Millyard, otherwise, he would asked for payment by check. Instead, Mr. Ison sought to ensure that Ms. Millyard traveled on the cruise and that her money would not be misused for Mr. Fiet's shortages. Moreover, Mr. Ison's wife testified that she too suggested that Ms. Millyard verify with NCL that she

had not been credited for the payment. R. 391: 456-57. As a result, Ms. Millyard telephoned NCL and paid the $1,000 by credit card the next day. R. 411: 74; Appellant's Brief, Addenda J at 10; K at 9.

At the very least, the evidence establishes that Mr. Ison acted in good faith in all of his representations. He investigated the facts extensively before requesting additional sums, including conducting a through accounting, contacting NCL and Mr. Fiet, and requesting Mr. Fiet to pay the money that he failed to forward to NCL. These measures eliminate any suggestion that Mr. Ison acted recklessly. Rather, he reasonably concluded that Mr. Fiet was liable to passengers for the shortages. Accordingly, he did what he thought was best to maintain goodwill with passengers and to ensure that the group sailed. As evidence of Mr. Ison's good faith, Mr. Ison gave up his own cabin, paid $6,000 out of his own pocket, and suffered a loss for his efforts. At most, this close case constituted a civil dispute over liability, not communications fraud.

III. DEFENSE COUNSEL SUBJECTED MR. ISON FOR FAILING TO OBJECT TO AN UNLAWFUL RESTITUTION AWARD.

Utah law did not authorize the trial judge to order Mr. Ison to pay Mr. Shupe and Ms. Burback for their losses. Utah Code Annotated section 76-3-201(4)(a)(i) (1999) requires trial judges to order restitution when a person is convicted of "criminal activity" or a person agrees to pay restitution "as part of a plea agreement." Because Mr. Ison was

convicted of a crime rather than pleaded guilty, he only owed restitution for his "criminal activit[ies]." Id. Utah Code Annotated section 76-3-201(1)(b) (1999) defines criminal activities as "any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct." See State v. Bickley, 2002 UT App 342, ¶8, 60 P.3d 582.

In arguing that persons are entitled to restitution whenever they suffer pecuniary loss as a result of criminal activity, the State overlooks the statutory definition of "criminal activity." State's Brief at 24-25. Because Mr. Ison has never admitted responsibility for Mr. Shupe's and Ms. Burback's losses, the trial judge only had authority to order restitution for offenses of which Mr. Ison was "convicted." Utah Code Annotated § 76-3-201(1)(b) (1999). Thus, contrary to the State's assertions, Mr. Ison properly relies on State v. Galli, 967 P.2d 930 (Utah 1998), State v. Mast, 2001 UT App 402, 40 P.3d 1143, and State v. Watson, 1999 UT App 273, 987 P.2d 1289, to support his claim that he was not convicted for giving Mr. Shupe a less expensive cabin or for failing to pay commissions to Ms. Burback. In all three of those cases, the courts concluded that the trial judge had ordered restitution for conduct unrelated to the defendants' convictions because, as here, the defendant was not "convicted" of criminal conduct. Galli, 967 P.2d at 937; Mast, 2001 UT App 402, ¶16, 40 P.3d 1143; Watson, 1999 UT App 273, ¶5, 987 P.2d 1289. Rather than imposing restitution for Mr. Ison's

conviction, the trial judge improperly "made inferences" that Mr. Ison had committed crimes with respect to the cabin assignment and commissions. Watson, 1999 UT App 273, ¶5, 987 P.2d 1289. Because Mr. Ison did not owe restitution to Mr. Shupe or Ms. Burback, defense counsel was ineffective for failing to object to these illegal restitution awards.

The State erroneously asserts that Mr. Ison suffered no harm from these restitution awards because he obtained a reduction to a misdemeanor based on his willingness to pay restitution. State's Brief at 26-27. This argument ignores the fact that the trial judge unlawfully ordered Mr. Ison to pay almost $1,300 in restitution. Presumably, the trial court would have reduced Mr. Ison's conviction whether or not he had been ordered to pay restitution to Mr. Shupe and Ms. Burback as long as he paid the amount of restitution that he lawfully owed. Mr. Ison's reduction has no relevance to this issue.

CONCLUSION

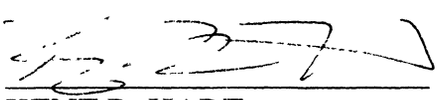
Mr. Ison request this Court to reverse his convictions because the State failed to present evidence of guilt. At the very least, Mr. Ison is entitled to a new trial to afford him the right to effective counsel.

Submitted, this 16th day of January, 2004.

KENT R. HART
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, KENT R. HART, certify that I have caused to be delivered eight copies of this brief to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 16th day of January, 2004.



KENT R. HART

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of January, 2004.

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